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IN THE
COURT OF APPEALS OF INDIANA

RICHARD SAYLES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A04-0707-PC-367
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW CIRCUIT COURT
The Honorable Stephen R. Heimann, Judge
Cause No. 03C01-0210-MR-1238

October 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Petitioner Richard Sayles ("Sayles") appeals the denial of his petition for post-conviction relief challenging his sentence for Murder.[1] We affirm.

Issue

Sayles raises three issues for review. We address the issue that is not procedurally defaulted: whether he was denied the effective assistance of appellate counsel.[2]

Facts and Procedural History

On direct appeal, this Court recited the pertinent facts as follows:

> Sayles' girlfriend, Linda Williamson ("Williamson") rented Room Number Four, with access to common bathrooms, in an apartment building located on Pearl Street in Columbus, Indiana. During September 2002, Sayles moved in with Williamson.
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> At approximately 8:00 p.m. on October 2, 2002, Rick Fordice ("Fordice"), the resident of Room Number Seven, heard an argument from inside Williamson's room. The residents appeared to be arguing over a broken television set. Fordice recognized Williamson's voice, as she stated "she paid the rent" and demanded that the other person "should get out." (Tr. 254.)
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> At approximately 5:30 a.m. the next morning, Fordice was headed for one of the bathrooms to take a shower, when he encountered Sayles. Sayles asked if Fordice was the person known as "Stretch," whose parents owned the building. Fordice introduced himself, but when he moved to shake Sayles' hand, he withdrew because he noticed what appeared to be spots of dried blood on Sayles' hands. Fordice asked Sayles for a cigarette, and Sayles searched his pockets for one. Sayles appeared to Fordice to be nervous, fidgety and intoxicated. Sayles pointed to his left shoulder, saying: "Look at what that crazy bitch did to me," but Fordice observed no marks on Sayles. (Tr. 260.)

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[1] Ind. Code § 35-42-1-1.

[2] We do not address Sayles's freestanding claim of a violation of his Sixth Amendment rights, i.e., that his right to a jury trial was violated when he received an aggravated sentence for Murder and the aggravators used to enhance the sentence beyond the presumptive term were not submitted to the jury or admitted by Sayles. "The fundamental error doctrine will not, as caselaw holds, be available to attempt retroactive application of Blakely [v. Washington, 542 U.S. 296 (2004)] through post-conviction relief." Smylie v. State, 823 N.E.2d 679, 689 n.16 (Ind. 2005).

When Sayles went back to his room to search for a cigarette, he left the door ajar and Fordice could see Williamson's arm or leg dangling off the bed.

At approximately 1:00 a.m. on October 4, 2002, Sayles and his mother appeared at the home of Sayles' brother Jeff Sayles. Sayles indicated that the purpose of his visit was to hug his relatives and that he would see them again after being "in prison for twenty-five or twenty years." (Tr. 100.) Sayles, his brother, and his mother proceeded to the Columbus Police Station.

Officer Ron May ("Officer May") was working at the front desk during the early morning hours of October 4, 2002. Sayles reported to Officer May that Linda Williamson was deceased and that her body could be found at 733 Pearl Street. Sayles did not provide an explanation of the circumstances of her death. Officer May dispatched other officers to the named residence, where they found Williamson's lifeless body on her bed. She had sustained multiple stab wounds to her upper body. Reaching between the mattress and box springs of the bed, Officer Alan Trisler recovered a 7-8 inch knife with smeared blood and displaying the initials R.N.S.

Sayles was arrested and charged with Williamson's murder. Christine Komlodi ("Komlodi"), Sayles' ex-wife visited Sayles in jail and asked him what happened. Sayles confessed to Komlodi "I killed her – I cut her with a knife," (Tr. 295), and "I cut her up pretty bad." (Tr. 299.) Sayles explained that he felt like he was in a dream, he could not wake Williamson, so he hid the knife, called his brother and went to his mother's house.

On October 21, 2002, Sayles filed his "Notice of Defense of Mental Disease or Defect," indicating his intention to raise an insanity defense. (App. 30.) On January 27, 2003, Sayles filed a motion for examination, requesting that the court appoint "two examiners endorsed by the [Indiana] State Psychology Board, at least one of whom must be a psychiatrist." (App. 70.) Sayles also requested that the examinations be recorded. The trial court appointed two examiners, one of whom was Dr. Phillip Coons ("Dr. Coons"). Dr. Coons examined Sayles on February 6, 2003 and audio-taped the interview. Subsequently, Sayles withdrew his insanity defense.

Sayles' jury trial commenced on August 26, 2003 and concluded on August 28, 2003. During the trial, the jury heard the audiotape of Dr. Coons' examination of Sayles. On August 28, 2003, the jury found Sayles guilty of murder. On October 7, 2003, the trial court sentenced Sayles to sixty-five years imprisonment.

Sayles v. State, No. 03A01-0311-CR-451, slip op. 2-4, (Ind. Ct. App. June 29, 2004). On appeal, Sayles challenged the admission of his audio-taped interview with a court-appointed psychiatrist and the denial of public funds to hire an alcohol addiction expert. He also

challenged his sixty-five year sentence as inappropriate. His conviction and sentence were affirmed. See id.

On June 24, 2004, five days before the Memorandum decision was issued, the United States Supreme Court issued its decision in Blakely v. Washington, 542 U.S. 296 (2004). On July 26, 2004, Sayles filed a pro-se petition for transfer, but did not raise a Blakely claim. On September 10, 2004, the Indiana Supreme Court denied transfer.

On September 15, 2004, Sayles filed a pro-se petition for post-conviction relief. With the assistance of the State Public Defender, Sayles filed an amended petition on February 8, 2006. The amended post-conviction petition alleged a deprivation of Sayles' Sixth Amendment right to a jury trial and the ineffectiveness of appellate counsel. On February 23, 2007 and on April 2, 2007, the post-conviction court conducted an evidentiary hearing on the allegations. On May 23, 2007, the post-conviction court entered findings of fact, conclusions of law and an order denying Sayles's petition. He now appeals the denial of post-conviction relief.

Discussion and Decision

A. Standard of Review

Defendants who have exhausted the direct appeal process may challenge the correctness of their convictions and sentences by filing a post-conviction petition. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002). Post-conviction proceedings are civil in nature and a defendant must establish his claims by a preponderance of the evidence. Ben-Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000). A petitioner who has been denied post-conviction

relief appeals from a negative judgment, and to the extent that his appeal turns on factual issues, he must convince this Court that the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction court. Stevens, 770 N.E.2d at 745. We do not defer to the post-conviction court's legal conclusions, but accept its factual findings unless they are clearly erroneous. Id.

Effectiveness of Appellate Counsel

Sayles contends that his appellate counsel was ineffective for failing to challenge the trial court's refusal of his proffered instruction on voluntary manslaughter. He also claims that appellate counsel should have filed a petition for rehearing or sought transfer based upon the Blakely opinion, issued five days before his direct appeal culminated in a memorandum decision, and thirty-five days before a petition for rehearing or transfer was due. See Ind. Appellate Rules 54, 57.

A defendant is entitled to the effective assistance of appellate counsel. Stevens, 770 N.E.2d at 760. Appellate ineffectiveness claims are evaluated under the standard of Strickland v. Washington, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a petitioner must show two things: (1) the lawyer's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

Appellate courts should be particularly deferential to an appellate counsel's strategic decision to include or exclude issues, unless the decision was "unquestionably

unreasonable." Bieghler v. State, 690 N.E.2d 188, 194 (Ind. 1997). To prevail on his allegation of ineffective assistance of appellate counsel, Sayles must show that counsel failed to fully present a significant and obvious issue and that this failure cannot be explained by reasonable strategy. See Stevens, 770 N.E.2d at 760. Appellate counsel is not deficient if the decision to present some issues rather than others was reasonable in light of the facts of the case and the precedent available to counsel when the choice was made. Id. Even if counsel's choice is not reasonable, to prevail, the petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different. Id.

Sayles argues that appellate counsel should have challenged the trial court's refusal to give his proffered Voluntary Manslaughter instruction because there was evidence of a quarrel such that the jury could have found the existence of sudden heat. In determining whether appellate counsel ignored a significant and obvious issue, we look to the trial record to discern whether the refusal was erroneous.

In Wright v. State, 658 N.E.2d 563, 566 (Ind. 1995), the Indiana Supreme Court set out the three-step analysis that a trial court is to perform when called upon by a party to instruct a jury on a lesser-included offense of the crime charged. First, the court must compare the statute defining the crime charged with the statute defining the alleged lesser-included offense. Id. If the alleged lesser-included offense may be established by proof of the same material elements or less than all the material elements defining the crime charged or if the only feature distinguishing the alleged lesser-included offense from the crime charged is that a lesser culpability is required to establish the commission of the lesser

offense, then the alleged lesser-included offense is inherently included in the crime charged. Id. If an offense is inherently included in the crime charged, the court must proceed to an examination of the evidence. Id. at 567.

If a trial court determines that an alleged lesser-included offense is not inherently included in the crime charged, then it must compare the statute defining the alleged lesser-included offense with the charging instrument in the case. Id. If the alleged lesser-included offense is neither inherently nor factually included in the crime charged, then the trial court should not give a requested instruction on the alleged lesser-included offense. Id.

If a trial court has determined that an alleged lesser-included offense is either inherently or factually included in the crime charged, it must look at the evidence presented in the case. Id. If there is a serious evidentiary dispute about the element or elements distinguishing the greater from the lesser offense and if a jury could conclude that the lesser offense was committed but not the greater, then it is reversible error for a trial court not to give an instruction, when requested, on the inherently or factually included lesser offense. Id.

Voluntary manslaughter is a lesser-included offense of murder, distinguishable by the factor of the defendant having killed while acting under sudden heat. Earl v. State, 715 N.E.2d 1265, 1267 (Ind. 1999). Sudden heat occurs when there is "sufficient provocation to engender passion." Id. (citing Johnson v. State, 518 N.E.2d 1073, 1077 (Ind. 1988)). Sufficient provocation is demonstrated by "such emotions as anger, rage, sudden resentment,

or terror [that are] sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." Id.

Because voluntary manslaughter is an inherently lesser-included offense of murder, we proceed to the third step of the Wright analysis. We must determine whether there is a serious evidentiary dispute regarding the distinguishing element between the greater and lesser offenses, i.e., sudden heat. Brown v. State, 770 N.E.2d 275, 280 (Ind. 2002). Where there is a serious evidentiary dispute such that a jury could have concluded that the lesser offense was committed but not the greater, it is reversible error for the trial court to have refused the tendered instruction. Id. If, on the other hand, there is no meaningful evidence from which the jury could properly find the lesser offense was committed, the court should not give the lesser-included offense instruction. Id. at 280-81.

Here, the evidence did not show that Sayles was subjected to provocation sufficient to obscure the reason of an ordinary person, in circumstances that prevented deliberation. Fordice overheard an argument during which Williamson demanded that Sayles vacate their shared room. However, an announcement during an argument that Sayles needed to move out does not establish sudden heat. See Matheney v. State, 583 N.E.2d 1202, 1205 (Ind. 1992) (stating in relevant part that evidence of anger alone does not support giving a voluntary manslaughter instruction and words alone cannot constitute sufficient provocation to give rise to a finding of sudden heat.) Furthermore, Fordice did not see any injury on Sayles consistent with his claim to Fordice that he had been attacked. As there is no meaningful evidence from which the jury could properly find that the lesser offense of

voluntary manslaughter was committed, the trial court properly refused the proffered instruction. Thus, appellate counsel was not ineffective for failing to raise an issue based upon the refusal.

Sayles also alleges that his appellate counsel should have timely been aware of the Blakely decision and raised a Blakely challenge by means of a petition for rehearing or a petition for transfer. Sayles contends that he had the right to have a jury determine whether or not there existed aggravating circumstances to support his sentence enhancement, according to Blakely. The Blakely court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

Appellate counsel's affidavit, admitted into evidence at the post-conviction hearing, included the following averment:

> My Brief of Appellant and Reply Brief were prepared and filed before the decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2204) [sic] was issued (6/24/04). I did not become aware of the Blakely decision in time to make a Blakely argument on rehearing or transfer.

(P-C.R. Ex. 2). As the post-conviction court observed, after the decision in his appeal was handed down, Sayles elected to represent himself and filed a pro-se petition for transfer. Sayles does not provide authority for the proposition that he was entitled to dual

representation at this time, i.e., that he could both represent himself and be entitled to the effective representation of appellate counsel for post-appeal petitions.

Furthermore, the Blakely decision did not address Indiana's sentencing scheme in particular. In Smylie v. State, 823 N.E.2d 679, 685 (Ind. 2005), our Supreme Court applied Blakely to invalidate portions of Indiana's sentencing scheme that allowed a trial court, without the aid of a jury or a waiver by the defendant, to enhance a sentence where certain factors were present. The Court has subsequently clarified that a sentence may be enhanced upon facts that "are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005). The Smylie decision was not available to appellate counsel when the petition for rehearing or transfer was due. Only the precedent available to appellate counsel at the time of the direct appeal is relevant to our determination of whether counsel was effective. McCurry v. State, 718 N.E.2d 1201, 1206 (Ind. Ct. App. 1999), trans. denied.

Finally, it is not apparent that a Blakely challenge by Sayles's appellate attorney would have changed the outcome, i.e., resulted in a reduction of Sayles's sentence. At the time of his offense, Indiana Code Section 35-50-2-3 provided that a person convicted of murder could be imprisoned for a fixed term of fifty-five years, with not more than ten years added for aggravating circumstances or not more than ten years subtracted for mitigating

circumstances.[3] In imposing a sentence of sixty-five years, the trial court found no mitigators and several aggravators including: risk of a violent alcoholic re-offending, brutality of the crime, lack of remorse, desire of the victim's family for a maximum sentence, criminal history, need for correctional treatment, and the victim was mentally or physically infirm.

A trial court's finding of some improper aggravators does not automatically result in a sentence reduction. When one or more aggravating circumstances cited by the trial court are invalid, the court on appeal must decide whether the remaining circumstance or circumstances are sufficient to support the sentence imposed. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Where the Court finds an irregularity in a trial court's sentencing decision, we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id.

It is uncontested that Sayles had a criminal history. In Morgan v. State, 829 N.E.2d 12, 15 (Ind. 2005), the Indiana Supreme Court confronted the issue of whether a defendant's criminal record, standing alone, is a sufficient aggravator to support any enhancement above the presumptive term. In addressing this issue, the Court recognized that "the question of whether the sentence should be enhanced and to what extent turns on the weight of an individual's criminal history." Id. Such "weight is measured by the number of prior convictions and their seriousness, by their proximity or distance from the present offense, and by any similarity or dissimilarity to the present offense that might reflect on a defendant's

[3] Indiana Code Section 35-50-2-3 now provides that one convicted of a murder committed on or after April 25, 2005 shall be imprisoned for a fixed term of between forty-five and sixty-five years, with the advisory

culpability." Id. While acknowledging that, in many instances, "a single aggravator is sufficient to support an enhanced sentence," the Morgan Court cautioned sentencing and appellate judges to think about the appropriate weight to give a history of prior convictions. Id.

Here, Sayles' prior convictions were dissimilar to the instant conviction, and not committed in close proximity to the instant offense. However, he also had a history of arrests not resulting in convictions. One violent episode of record took place approximately one week before the murder, when Sayles strangled Williamson and threatened to kill her. A record of arrest, without more, does not establish the historical fact that a defendant committed a criminal offense; however, a record of arrest may reveal that a defendant has not been deterred even after having been subject to police authority and can be relevant to an assessment of the defendant's character. Cotto, 829 N.E.2d at 526. Sayles's criminal history supports an enhancement of the presumptive sentence but does not, standing alone, support a maximum sentence.

On the other hand, the brutality of the crime was significant. Had the matter been remanded for re-sentencing following a Blakely challenge, a jury impaneled for the purpose of determining the aggravating circumstances would be privy to the following evidence of record. Multiple stab wounds were inflicted, some of which were characterized by the attending physician at the autopsy as "through and through" wounds, because they completely pierced the bone of Williamson's arm. (Tr. 350.) Williamson sustained a jagged cut from her neckline down to the middle of her collarbone and ultimately died of a knife

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sentence being fifty-five years.

blow into her heart. These particularized circumstances of the crime, together with Sayles's criminal history, are such that we cannot say there is a reasonable probability that the ultimate outcome would be different had appellate counsel sought rehearing or transfer.

Accordingly, we are not persuaded that appellate counsel was deficient or that Sayles was prejudiced by counsel's failure to petition for rehearing or transfer.

Conclusion

Sayles has failed to demonstrate that appellate counsel's performance was deficient and that he suffered resulting prejudice. Accordingly, the post-conviction court did not err in rejecting Sayles's ineffective assistance claim and denying post-conviction relief.

Affirmed.

BAKER, C.J., concurs.

VAIDIK, J., concurs in result.